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How Should Repressed Memory Cases Be Handled?

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HOW SHOULD REPRESSED MEMORY CASES BE HANDLED?

A 37-year-old woman files suit in court, alleging that while she was a child her father sexually molested her repeatedly and told that she would be killed if she told anyone about what was happening. The woman further claims that she has had no memory for these events for her adult life and only recovered memories about being molested a number of times after entering therapy. Her father has responded to the lawsuit by denying the allegations and by filing a lawsuit against the therapist, claiming that the therapist implanted false memories about the alleged abuse. How should judges handle these lawsuits? The Bowman and Mertz[1] paper provides a scientifically accurate and policy-wise roadmap for answering this inquiry.

Five questions involving science and policy are involved in resolving this factual and legal dispute.

First and foremost is the scientific issue of whether repressed memories are real. (1) Are the memories real and not the product of suggestion and/or imagination? (2) According to the scientific literature, are these memories accurate? (3) What does science say about the ease and frequency of implanting false memories about severe and continuous traumatic events, such as childhood sexual molestation by family members? These three questions are frequently the subject of a *Frye*[2] or *Daubert*[3] evidentiary hearing.

Once the science is established, two policy questions remain. (1) Should the statute of limitations be tolled during the period during which the memories were unavailable? (2) Should the concept of duty be extended to require a therapist to be answerable to third-party nonpatients under certain conditions?

The Science and Reality of Repressed Memory. Are repressed[4] memories scientifically valid? Following the Pope and Hudson[5] guidelines for determining what studies are relevant to this issue, Scheflin and Brown[6] found 25 studies directly on point. All 25 studies found repressed memory to be real. In other words, in every study in which sexual abuse can be proven, a subpopulation of the subjects reported that there was a substantial period of time during which they had no memory of continuous childhood sexual abuse. Brown, Scheflin, and Hammond[7] found an additional five studies, all of which reach the same conclusion. Whitfield[8] reported on two or three different studies, all of which reach the same conclusion. Thus, *every* relevant scientific study in the memory and trauma literature supports the reality of repressed memory. False memory advocates have been unable to cite a single study supporting their opinion that repressed memory does not exist.

Most of the major mental health organizations—the American Medical Association,[9] the American Psychiatric Association,[10] the American Psychological Association,[11] and the British Psychological Society[12]—have issued reports accepting the validity of repressed memory. In addition, as Bowman and Mertz correctly note, the evolving biochemical and neurological literatures on memory and the brain also support the reality of repression.[13]

The Pseudoscience. False memory proponents have argued that repressed memory is the psychiatric quackery of the twentieth century, and have compared it to lobotomies, to the Salem witch trials, and to Nazi extermination programs. What is their proof for such strong claims? As reflected in the False Memory Syndrome Foundation's prepared brief,[14] which they advertise and sell for use as amicus curiae in cases around the country, false memory proponents rely on two documents: a book chapter by Holmes[15] and two nearly identical papers by Pope and Hudson, mentioned above. Holmes wrote that he could find no laboratory proof of repression despite 60 years of experiments that had been conducted on the subject. Does this opinion represent the prevailing scientific viewpoint? The answer is clearly no. First, the other 17 chapters in the book disagree with Holmes and accept the legitimacy of repression. Second, Holmes himself acknowledges that his view is such a distinct minority that he wondered why he had been invited to present his opinion in the first place. Third, laboratory proof of repression would require traumatizing subjects for experimental purposes. Our laws and ethical rules do not permit sexually molesting children in the laboratory to see whether they remember the traumatization later. Fourth, Holmes's viewpoint has been effectively demolished in an important paper by Gleaves.[16]

With regard to the Pope and Hudson papers, they examined four studies, all of which demonstrated the reality of repression, and raised objections to the methodology employed in each study. Even assuming that their critique of the four studies is valid, their paper can only be cited for the proposition that repressed memory has not been proven. Their paper cannot logically be cited for the proposition that repressed memories do not exist. However, as noted above, there are now more than 30 studies, reflecting several different research designs or methods, and all of them reach the conclusion that repression exists. Thus, the Pope and Hud-

son papers are, at best, out of date concerning the current scientific literature. Furthermore, Pope and Hudson did not address the increasing biochemical or neurological literatures in support of repression.

It should thus be clear that there is no scientific evidence in support of the rejection of repressed memory.

The Accuracy of Repressed Memory. Bowman and Mertz discuss the issue of whether repressed memories may be accurate. The scientific literature fully supports their conclusion. Only three studies have addressed the issue of the *accuracy* of recovered memories,[17] and all three studies reached the same conclusion—that recovered memories are no less accurate than memories that were continuously remembered.

Implanting Memories. Bowman and Mertz conclude that "there is more scientific evidence documenting the possibility of accurate delayed (or 'repressed') recall of childhood abuse than there is of the possibility of creating full-blown false memories of sexual abuse" (p. 7). Brown, Scheflin, and Hammond,[18] in the most comprehensive review of the scientific literature concerning repressed memory issues, support this conclusion. In fact, "memories" are not implanted at all; rather, some false beliefs can be reported after suggestion or social influence. But the process is not simple and is reversible. Bowman and Mertz rightly conclude that false belief reports may be obtained by "heavy-handed" persons using influence techniques. Recent evidence suggests that if social influence techniques can be used by therapists and family to encourage false belief reports, these techniques may also be used by lawyers and family to encourage recanting of true memories of actual sexual abuse.

Statutes of Limitation. Because repressed memories may be accurate, because repression constitutes an involuntary mechanism, and because childhood sexual abuse is a heinous act known to produce repressed memories as a consequence, a tolling of the statute of limitations is essential in those states that support protecting children from abuse, such as by legislating mandated reporting statutes.[19] The issue of stale claims can be handled by requiring independent corroboration of the child abuse allegations, which is probably necessary anyway for plaintiffs to sustain their burden of proof.

Third-Party Lawsuits. For more than a century, American tort law has maintained a privity barrier protecting professionals from third-party lawsuits. The privity barrier has been lowered in only two situations—the potential for physical harm or the existence of an intended beneficiary of the services rendered by the professional. Neither exception applies to repressed memory cases. To hold therapists liable to nonpatients who are not intended beneficiaries will destroy mental health ethics, just as it would destroy the duty of loyalty owed by a lawyer to a client. Conflict-of-interest ethics rules serve as a much needed barrier to protect against such devastating liability. Courts[20] and commentators[21] generally have recognized the importance of maintaining the sanctity of the privity barrier in cases involving third-party lawsuits against therapists.

Bowman and Mertz have provided a scientifically accurate presentation of the repressed memory issues. Judges are well advised to heed their articulate presentation.

NOTES

1. C. G. Bowman & E. Mertz, *What Should the Courts Do About Memories of Sexual Abuse? Toward a Balanced Approach,* 35 THE JUDGES' J. 7–17 (Fall 1996).

2. Frye v. United States, 293 F. 1013 (1923).

3. Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993).

4. Although the term "repressed" will be used in this article, the proper term, according to the scientific literature, should be either "dissociative amnesia" or "traumatic amnesia." *See* D. Spiegel & A. W. Scheflin, *Dissociated or Fabricated? Psychiatric Aspects of Repressed Memory in Criminal and Civil Cases,* 42 INT'L J. CLINICAL & EXPERIMENTAL HYPNOSIS 411–32 (1994). The equation of "repression," which is an involuntary defense mechanism to severe trauma, with "forgetting," such as was done by the judges in Doe v. Maskell, 342 Md. 684, 679 A.2d 1087 (1996), violates science and common sense. For a substantial critique of the reasoning in *Doe,* see D. BROWN, A. W. SCHEFLIN & D. C. HAMMOND, MEMORY, TRAUMA TREATMENT, AND THE LAW, ch. 16 (1997).

5. H. G. Pope & J. I. Hudson, *Can Individuals "Repress" Memories of Childhood Sexual Abuse? An Examination of the Evidence,* 25 PSYCHIATRIC ANNALS 715–19 (1995); H. G. Pope & J. I. Hudson, *Can Memories of Childhood Sexual Abuse Be Repressed?* 25 PSYCHOL. MED. 121–26 (1995).

6. A. W. Scheflin & D. Brown, *Repressed Memory or Dissociative Amnesia: What the Science Says,* 24 J. PSYCHIATRY & L. 143–88 (1996).

7. D. BROWN, A. W. SCHEFLIN & D. C. HAMMOND, MEMORY, TRAUMA TREATMENT, AND THE LAW (1997).

8. C. L. WHITFIELD, TRAUMATIC AMNESIA: THE EVOLUTION OF OUR UNDERSTANDING FROM A CLINICAL AND LEGAL PERSPECTIVE (in press, 1997).

9. American Medical Association, Council on Scientific Affairs, Memories of Childhood Abuse, CSA Report 5-A-94 (1994).

10. American Psychiatric Association, APA Board of Trustees Statement on Memories of Sexual Abuse (1993).

11. American Psychological Association, APA Board of Directors Statement on Recovered Memories (Aug. 10, 1995).

12. British Psychological Society, Report by the Working Group on Recovered Memories (1995).

13. R. JOSEPH, NEUROPSYCHIATRY, NEUROPSYCHOLOGY, AND CLINICAL NEUROSCIENCE (2d ed. 1996).

14. Brief of Amicus Curiae, The False Memory Syndrome Foundation, prepared by Thomas A. Pavlinic, Esq.

15. D. Holmes, *The Evidence for Repression: An Examination of Sixty Years of Research, in* J. L. SINGER (ed.), REPRESSION AND DISSOCIATION: IMPLICATIONS FOR PERSONALITY, THEORY, PSYCHOPATHOLOGY, AND HEALTH 85–102 (1990).

16. D. H. Gleaves, *The Evidence for "Repression": An Examination of Holmes (1990) and the Implications for the Recovered Memory Controversy,* 5 J. CHILD SEXUAL ABUSE 1–19 (1996).

17. L. M. Williams, *Recovered Memories of Abuse in Women with Documented Child Sexual Victimization Histories,* 8 J. TRAUMATIC STRESS 649–73 (1995); C. J. Dalenberg, *Accuracy, Timing and Circumstances of Disclosure in Therapy of Recovered and Continuous Memories of Abuse,* 24 J. PSYCHIATRY & L. 229–75 (Summer 1996); Andrews, Brewin *et al.,* The Characteristics, Context and Consequences of Memory Recovery Among Adults in Therapy, Paper Presented at the British Psychological Society Annual Conference, Edinburgh, April 1997.

18. D. BROWN, A. W. SCHEFLIN & D. C. HAMMOND, MEMORY, TRAUMA TREATMENT, AND THE LAW (1997).

19. M. R. Williams, *Suits by Adults for Childhood Sexual Abuse: Legal Origins of the "Repressed Memory" Controversy,* 24 J. PSYCHIATRY & L. 207–28 (Summer 1996).

20. Zamstein v. Marvasti, 1997 WL 195,414 (Conn. Sup. Ct.); Bird v.